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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 187.

JOEL A. MALOY and RUTH MALOY, His Wife,
Petitioners,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WEST PALM BEACH, a Corporation Existing Under the Laws of the United States of America,
Respondent.

PETITION FOR REHEARING.

JOEL A. MALOY,
RUTH MALOY, His Wife,
Petitioners,
405 S. E. 4th Avenue,
Delray Beach, Florida.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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PETITION FOR REHEARING.

Petitioners respectfully show unto this Honorable Court:

I.

Trial by due process of law was denied petitioners, at the hearing of this cause on complaint and answer. Suit brought by respondent as plaintiff to foreclose mortgage for failure to pay installments due on promissory note and city taxes.

Plaintiff's Motion for Summary Final Decree granted by trial court, **is on the ground that there is no genuine issue as to any material fact, as complaint alleges failure to pay installments due on note and taxes and the affirmative defenses of the answer admit failure to pay installments due on an Account Card** and pursuant to its rules for payment. And there is attached thereto and by reference made a part, not the promissory note and mortgage sued on, but a photostatic copy of an **Account Card** and affidavit as to payments due and with reference thereto states:

> "An examination of the affidavit and account card shows that the balance of the account as of May 1, 1957 is in fact $4,276.30."

And the supporting affidavit avers:

> "Before me the undersigned authority personally appeared Margaret M. Peters, who by me being first duly sworn deposes and says that she is Treasurer of First Federal Savings and Loan Association of West Palm Beach, plaintiff herein, and that among her duties is the supervision of records, **pertaining to the accounts of mortgages,** held by the Association; that attached hereto is a copy of the **account card** from the Association's records **pertaining to** the account of Joel A. Maloy and Ruth Maloy * * * which is involved in the instant suit; that said copy shows the status and history of said account from its inception. Affiant further says that the balance of said account as of May 1, 1957, * * * is accurately shown by said account card and was $4,276.30" (Emphasis added).

Defendants' Motion for Summary Final Decree denied by the trial court, **is on the ground that there is no genuine issue as to any material fact and defendants entitled to Summary Final Decree as a matter of law.** An-

swer denying defaults states: "Defendants deny the allegations of paragraph 2 of said complaint". And the affirmative defenses state that defendants not in default because of demand for payment of installments due on the Account Card and pursuant to its rules for payment to plaintiff's advantage. Taxes paid to compel payment, after giving permission to seek reduction because of trippling. That in reply to repeated requests for correction in letters of May 7 and June 10, 1957, of excessive $4,276.30 balance shown due in book furnished after payment of April 20 installment instead of $4,255.01, plaintiff firs threatened foreclosure and advised of payment of taxes, in letter of June 7. Exhibit "C". That again threatening foreclosure, plaintiff advised of requirement for payment on the **Account Card** and of rules—under which April 20 installment paid by check inadvertently dated April 30 when mailed, was an "omitted" payment and not credited until May 1 so as to charge and add to balance due interest of $21.39 on April 30 and $21.50 on May 1, in letter of July 9, Exhibit "D".

Order for Summary Final Decree entered by the trial court granting plaintiff's Motion as a matter of law for failure to pay on the **Account Card "pertaining to this mortgage"** and denying defendants finds:

> "(3) That the said defendants are in default for failure to pay any installments of said promissory note subsequent to the installment paid April 20, 1957.
>
> The said defendants admit that such payments have not been made but contend that failure to make such payments was occasioned by plaintiff's improperly posting interest to the account. **The Court has examined the affidavit made by the Treasurer of plaintiff and the attached copy of plaintiff's account card pertaining to this mortgage** and finds no error in the calculations.

"(4) That the said defendants are in default for failure to pay the 1956 taxes due to the City of Delray Beach on the mortgaged property which taxes were paid by the plaintiff."

And the Summary Final Decree orders sale of property.

II.

The trial court was required under Rule 1.36 of the Florida Rules of Civil Procedure to grant defendants' Motion, the plaintiff failing to meet the requirements for the filing of affidavits in proof of allegation of complaint of this rule, as follows:

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment or decree may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for Summary Judgment or Decree by the adverse party, move with or without supporting affidavit for a summary judgment or decree in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment or decree is sought may, at any time, move with or without supporting affidavit for a summary judgment or decree in his favor as to all or any part thereof.

(c) **Motion and Proceeding Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the date of hearing may serve opposing affidavits. The judgment or decree sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any shows that there is

no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law. A Summary judgment or decree, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment or decree is not rendered upon the whole case or for all the relief asked and a trial, or the taking of testimony and a final hearing, is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial or final hearing of the action the facts so specified shall be deemed established, and the trial or final hearing shall be conducted accordingly.

(e) **Form of Affidavits:** Further testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or further affidavits.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court

may refuse the application for judgment or decree or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavit caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Florida Statutes Annotated, Vol. 30, p. 735.

In construing the provisions of this Rule, the Supreme Court of Florida has repeatedly held that summary judgment or decree is permissible only when the pleadings, depositions or admissions on file, together with the affidavits, if any show that there is no genuine issue of material fact and that the movant is entitled to judgment or decree as a matter of law. The Court so held in Humphrey v. Jarrell, App. 1958, 104 So. 2nd 404. And held that a summary decree may be obtained in a declaratory action, but the moving party must be entitled to judgment or decree as a matter of law in Pancoast v. Pancoast, App. 1957, 97 So. 2nd 875.

To the same effect is Rule 56 of the Federal Rules of Civil Procedure and decisions thereunder, providing:

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment, may at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judg-

ment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceeding Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue as to the amount of damages. As amended Dec. 27, 1946. Effective March 19, 1948.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case for all the relief asked and a trial is necessary, the court at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable, ascertain what material facts exist without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits: Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any defending party or attorney may be adjudged guilty of contempt.

United States Code Annotated, Vol. 28, p. 153.

Under this Rule, this Court held that a motion for summary final decree may be granted only where the pleadings, depositions and admissions on file, together with any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. U. S. v. Costa, D. C. Del.

1955, and again in Armstrong v. Avco Mfg. Corp., D. C. Del., 1955, 137 F. Supp. 680, where this court held moving party entitled to summary judgment, where truth is clear.

III.

Appeal brought under Rule 19 (1) (b) providing this court will take jurisdiction where a court has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. And 19 (2) that the Court will where by any court whose determinations are by law reviewable on writ of certiorari.

There can be no greater than where an accused charged with certain offense, tried and convicted of another. And with such a record showing trial court held mortgagor's admitted failure to pay on an Account Card, proof of failure to pay installments due on note and taxes, there no doubt but that Federal question sought to be reviewed was raised and passed on by trial and appellate courts of Florida.

Trial Court "ratified and confirmed" entry of Order for Summary Final Decree, when departure pointed out in Petition for Rehearing stating defendants signed promissory note, not the Account Card offered in proof of default (3-12); that required to pay on note, not required to pay on Account Card or failing held in default in payment of installments due on note or taxes, paid to compel payment (pp. 14-17).

District Court of Appeal in one word Opinion affirmed trial Court, having considered Assignments of Error stating Court erred in finding default for failure to pay on the Account Card and an affidavit as to its requirements (No. 1). In finding plaintiff entitled to Summary Final Decree as a matter of law, where the Motion merely states failure

to pay and there no proof of failure to pay installments due on note or taxes in accordance with provisions of note and mortgage, nor the same attached. No. 7. Erred in interpretation of facts and law. No. 16.

District Court of Appeal denied Petition for Rehearing, stating that petitioners not proved and found in default as required by law (Par. 1 [9]) * * * yet are held to be in default and their property ordered taken from them, and stating:

> "Petitioners have been denied those inalienable rights guaranteed in and by the Constitution of the State of Florida, Section 4 of the Declaration of Rights, providing: 'All courts of this State shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy in due course of law and right and justice shall be administered without sale, denial or delay.'
>
> And the Constitution of the United States, Amendment XIV, Section 1, providing: '* * *; nor shall any state deprive any person of life, liberty or property without due process of the law * * *' " (Par. 2 [3, 4]).

Supreme Court of Florida denied Petition for Writ of Certiorari and the Order states: "* * * and the record having been inspected." Petition states the record shows petitioners not proved and found in default as required by law, their property ordered taken from them, having been held in default (Par. 3 [i]), and:

> "That petitioners have been denied their inalienable rights guaranteed in and by the Constitution of the State of Florida, Section 4 of the Declaration of Rights providing: 'All courts of this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy in due course of law.'

And the Constitution of the United States, Amendment XIV, Section 1, providing: '* * * nor shall any state deprive any person of * * * property without due process of the law.'" (Par. 3 [i]).

Wherefore, petitioners respectfully pray that this Honorable Court grant this Petition for Rehearing and upon a rehearing grant the Petition for Writ of Certiorari heretofore filed in this cause, and your petitioners will ever pray.

Respectfully submitted,

JOEL A. MALOY,
RUTH MALOY, His Wife,
Petitioners.

Certificate.

I hereby certify that the above Petition for Rehearing is presented in good faith and not for delay and the reasons urged were not heretofore sufficiently presented.

.....
Ruth Maloy, Petitioner.